Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, JULY 31, 2003
WWW.USDOJ.GOV

AT
(202) 514-2007
TDD (202) 514-1888

STATEMENT BY ASSISTANT ATTORNEY GENERAL R. HEWITT PATE REGARDING THE CLOSING OF THE ORBITZ INVESTIGATION

Investigation Concludes Orbitz Joint Venture Has Not Harmed Consumers or Reduced Competition

WASHINGTON, D.C. – R. Hewitt Pate, Assistant Attorney General in charge of the Department's Antitrust Division, issued the following statement today after the Department announced the closing of the Orbitz joint venture investigation:

"After an extensive investigation of the available facts, the Antitrust Division concluded that the Orbitz joint venture has not reduced competition or harmed airline consumers. This thorough review involved interviewing numerous interested parties, reviewing many documents that were produced by Orbitz as well as by third parties, engaging in extensive empirical analyses of airline booking data, and examining the analyses suggested by third parties.

"The Division considered several theories of harm none of which was ultimately borne out by the information collected by the Antitrust Division. These concerns included whether certain Orbitz contract terms would facilitate coordination among the participating airlines or reduce their incentives to discount resulting in higher fares and whether those contract terms would make the Orbitz joint venture dominant in online air travel distribution. The Division found that those terms did not result in higher fares or make Orbitz dominant in online air travel distribution."

(Background information is attached.)

###

03-437

DEPARTMENT OF JUSTICE ANTITRUST DIVISION
STATEMENT REGARDING THE CLOSING OF ITS ORBITZ INVESTIGATION

Today the Department of Justice announced that it has closed its investigation of the Orbitz joint venture, the travel website owned by five major domestic airlines. The Department's investigation focused on the "most favored nation" ("MFN") agreement among the owner airlines and so-called "charter associates" of Orbitz that they will market through Orbitz any publicly available fares they offer through third party websites or their own proprietary websites. After a lengthy and thorough review, the Antitrust Division has determined that the evidence does not show that Orbitz has reduced competition or harmed consumers.

The Division examined two primary concerns. First, would the Orbitz MFN facilitate coordination among the airlines or reduce their incentives to discount, resulting in higher fares? Second, would the MFN agreement make Orbitz dominant in online air travel distribution?

Beginning in the spring of 2000, a year before the launch of Orbitz in June 2001, a team of Division lawyers and economists began collecting and analyzing extensive information about Orbitz and its impact on air travel markets. The Division interviewed numerous representatives of Orbitz and third parties, thoroughly examined the theoretical and empirical analyses suggested by third parties, reviewed the many documents that were produced in response to civil process, and engaged in empirical analyses of airline booking data obtained from Orbitz and third parties.

In light of the high level of public interest in this matter, the Division is providing this brief explanation of the analysis that led to its decision to close the Orbitz investigation. This discussion is limited by the Division's obligation to protect the confidentiality of certain information that informed the decision. Like all of the Division's investigations, this one has been highly fact-specific, and many of the underlying facts central to the decision are not public.

Consequently, readers should not draw conclusions regarding how the Division is likely to analyze particular collaborations or activities, or transactions involving particular firms, in the future.

Airline Ticket Distribution

Airlines market their tickets in various ways. Historically, airlines sold the vast majority of their tickets through traditional "brick-and-mortar" travel agents. More recently, airlines have also sold through online travel agencies, such as Orbitz, Expedia, and Travelocity. Airlines pay incentives to both traditional travel agents and online travel agents and pay booking fees to the computer reservation systems ("CRSs") through which the agents book flights. In addition, airlines have been selling an increasing number of tickets on their own internet sites. Many low cost carriers have been successful in making the majority of their sales on their own websites, thus limiting their payment of incentives and CRS fees. Internet sales represent about 15 percent of all airline tickets sold in the United States, and airlines have used internet marketing to exert competitive pressure on travel agencies and CRSs to reduce the costs of distribution through traditional channels.

The Orbitz Joint Venture

In November 1999, United Airlines, Continental Airlines, Delta Airlines, and Northwest Airlines announced their intention jointly to establish a travel website similar to Travelocity and Expedia. American Airlines eventually joined this joint venture, which became known as Orbitz. More than 40 foreign and domestic airlines later became "charter associates." Southwest, Jet Blue, Air Tran, and ATA are the most notable domestic carriers that have not signed charter associate agreements.

All Orbitz owners and charter associates are bound by the MFN agreement. They also receive a partial rebate of CRS booking fees for tickets sold through Orbitz and some limited incentives to offer fares exclusively on Orbitz.

The Division's Analysis

Although a joint venture ultimately may be procompetitive, any agreement among major horizontal competitors in a concentrated industry to collaborate and jointly market their products or services, particularly if they agree to restrict their individual marketing prerogatives, raises serious antitrust concerns.

Reduced Airfare Discounting

The Division examined several ways the Orbitz MFN might reduce competition for discount airline fares. First, in theory, the Orbitz MFN agreement undercuts the participating airlines' incentives to compete by offering discount airfares, because those fares must be offered on the Orbitz website where customers might instead buy from another carrier. Second, the MFN prevents these carriers from offering their best fares only on their individual websites, generally their lowest cost distribution channel. Third, the Orbitz MFN could provide a convenient means for the airlines to monitor each other's fares. By improving monitoring, Orbitz might facilitate collusion among the participating airlines and thereby curtail discounting. Fourth, the improved monitoring could also curtail discounting by allowing competitors to match a carrier's discounts more quickly. Rapid matching results in revenue dilution, thus reducing the sales bump or first mover advantage of offering a low web fare.

The available empirical evidence, however, did not show that the MFN has resulted in a reduction in discount fares. Since the initiation of the Orbitz service in June 2001, average airfares have decreased. While many factors could have influenced this decrease in fares, including the terrorist attacks of September 11, 2001 and airline financial difficulties, the overall decrease in the fares consumers pay is inconsistent with the Orbitz MFN causing significantly higher fares.

Although average web-only fares have increased since Orbitz began offering its service, the evidence indicates this is the result of a change in the nature and composition of web-only fares. Before the advent of Orbitz, airlines primarily used web-only fares to sell distressed inventory at the last minute, typically announcing them on a Wednesday for travel the coming weekend. These weekend web fares were generally quite low compared to regular published fares. Airlines continue to offer these distressed inventory web fares, but since the initiation of the Orbitz service, the airlines have expanded their use of web-only fares. Newer web-only fares are typically available in most markets in which an airline flies, allow passengers to travel on weekdays, and are available for purchase far in advance. These fares are lower than an airline's standard fares, but not as low as the distressed inventory web fares. The Division's investigation showed that the volume of web-only fares offered has increased dramatically – six-fold in less than a year – since Orbitz began its service. Because there are so many more of the newer type of web fares, which are not as deeply discounted as the distressed inventory fares, it is not surprising that average web fares have increased. And, as noted above, the average of all domestic airfares decreased over this time period.

The Division's investigation also showed that participating carriers continue to compete through their own websites. The revenues Orbitz owners obtain through their own websites has continued to grow significantly while Orbitz has been in operation, and the percentage of revenues the owners generate on their own sites has remained steady. The Division also found that the Orbitz owners have improved their sites to make them more user friendly, and that they continue to compete by offering frequent flyer bonuses on their own sites.

Finally, many low cost carriers, including Southwest, Jet Blue, ATA, and Air Tran, did not become charter associates, and therefore Orbitz creates no disincentive for these carriers to offer low fares. Moreover, in the markets they serve, the low cost carriers exert pressure on Orbitz owners and charter associates to offer more competitive fares.

Reduced Competition in Online Distribution of Airline Tickets

The second potential concern that the Division addressed was whether the Orbitz MFN agreement, together with the incentives for the participating airlines to offer fares exclusively on Orbitz, would reduce competition in the online distribution market by making competing distributors less attractive to consumers, possibly forcing them to reduce their investment in technological development and innovation or even exit the online travel distribution business. If this happened, Orbitz could gain market power in online distribution, resulting in higher airline ticket distribution costs, lower quality distribution services, and ultimately higher airline ticket prices.

The evidence gathered in the Division's investigation showed that while Orbitz initially grew rapidly, its growth leveled off after several months. Not only has Orbitz not achieved a dominant position, it has remained the third largest online travel agency for over a year. The Department of Transportation reported in December 2002 that Orbitz had 24 percent of online ticket sales. Rival sites have continued to grow in airline ticket revenues and other revenues. Notwithstanding the MFN, rival websites continue to compete aggressively against Orbitz and have been able to obtain access to many web-only fares. As for the incentives to offer fares exclusively on Orbitz, our investigation revealed that few, if any, such exclusives were ever employed, and the likely future effect of this provision appears trivial.

Conclusion

The Division devoted substantial resources to the investigation into whether the Orbitz joint venture is likely to result in potential anticompetitive effects harmful to consumers, and it considered several theories of harm, which ultimately were not supported by the evidence. The Division has concluded that neither the formation of Orbitz nor the Orbitz MFN has harmed consumers, and therefore the Division has closed its investigation.